TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 231

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
PETITIONER,

vs.

NORTHSIDE BELT RAILWAY COMPANY

IN WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1927.

CERTIORARI GRANTED MAY 2, 1927.

(32,654)

(32,654)

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[fols. a-c] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, AT HOUSTON

No. 247. Equity

TEXAS & NEW ORLEANS RAILROAD COMPANY

versus

NORTH SIDE BELT RAILWAY COMPANY ET AL.

WAIVER OF PRÆCIPE AND STIPULATION AS TO TRANSCRIPT OF RECORD—Filed October 6, 1925

All parties to the above styled and numbered suit by and through their respective counsel, hereby waive the issuance of præcipe and agree that the following list of documents are to constitute the record of appeal, which record is to embrace said documents in the order named:

1. Plaintiff's Original or amended original bill of complaint.

2. Stipulation as to plaintiff's exhibits and amendments.

3. Defendant's amended or original answer.

[fol. 2] 4. Final Decree.

5. Opinion of the Court.

6. Application of restraining order pending appeal.

7. Judgment of the Court refusing restraining order.

8. Petition for appeal and Court's order thereon.

9. Assignments of error, and supplemental assignment of error.

10. Appeal Bond.

11. Waiver of Præcipe and stipulation as to documents which are to constitute the record on appeal.

12. Waiver of Citation on Appeal.

13. Statement of facts and exhibits attached thereto.

14. Certificate of the Clerk.

Nelson Phillips, W. W. Moore & J. Y. Powell, Attys. for Northside Belt Ry. Co., and Baker, Botts, Parker & Garwood, Garrison & Watson, Attorneys for the Texas & New Orleans Railroad Company.

[fol. 3] [Caption omitted]

IN UNITED STATES DISTRICT COURT

BILL FOR INJUNCTION—Filed June 13th, 1925

To the Honorable J. C. Hutcheson, Judge of said Court:

Comes now Texas & New Orleans Railroad Company, hereinafter styled "Complainant," and complaining against and suing Northside Belt Railway Company, hereinafter styled "Respondent," and represents and shows to the Court:

[fol. 4] I

That complainant is a corporation created, organized and existing under and by virtue of the laws of the State of Texas and has its domicile in the City of Houston, Harris County, in the Southern District of the State of Texas, and that respondent is also a corporation created, organized and existing under and by virtue of the laws of said State of Texas, having its domicile in said City of Houston, Harris County, in the Southern District of said State.

II

That respondent was created and exists for the purpose of constructing, owning, maintaining and operating a terminal railway and has and possesses the right to exercise all of the rights, powers and privileges conferred by Subdivision 53 of Article 1121 of the Revised Statutes of Texas, which said Subdivision of said Article is as follows, to-wit:

"The construction, operation and maintenance of terminal railways; and any such terminal railway company, in addition to the rights conferred by law upon corporations generally, shall have and exercise all rights and powers conferred upon railroad companies by Chapters 8 and 9, Title 115 of the Revised Statutes of Texas, relating to railroads. And when any such terminal railway company is adjacent to any inland navigable stream or water body, it shall have the right and power to construct, erect, operate and maintain all necessary and convenient facilities of every kind and character to accommodate and expeditiously handle the exchange of freight and passenger traffic with any and all steamships, and all other vessels and water [fol. 5] craft using such waterways. Such terminal railway company shall also have the right to issue bonds in excess of its authorized capital stock; provided, that its stock and bonds shall be issued under the direction of the Railroad Commission of this State, in accordance with the stock and bond law regulating the issuance of stocks and bonds by railroads; and the commission shall fix the values of the property, rights and franchises of such terminal railway company; and its stock and bonds shall not exceed the amount authorized by the Railroad Commission of Texas; and jurisdiction over the issuance of the bonds herein authorized is hereby expressly vested in the Railroad Commission; provided, that no such terminal company shall have the right to charge any railroad company, steamship, vessel or water craft for terminal facilities a greater amount than may be, from time to time, designated and established by the Railroad Commission, which shall have authority to establish and prescribe such rates and rules for the operation of all such terminal companies as will prevent discrimination by them against any common carrier with respect to either charges or service; provided, further that the provisions of Articles 6656, 6657 and 6658 of the Revised Statutes of Texas shall apply to any and all orders, rulings, judgments and decrees of the Railroad Commission made, entered or held under the provisions of this subdivision in regard to such terminal railway companies."

III

That said respondent is a common carrier by railroad, subject to the Interstate Commerce Act enacted by the Senate and House *and* Representatives of the United States on February 4, 1887, and thereafter from time to time [fol. 6] amended, and is further a common carrier by railroad, subject to the terms and provisions of the Transportation Act of 1920, enacted by the Senate and House of Representatives of the United States on February 28, 1920.

IV

That said respondent has projected and is constructing or about to construct a certain main line of railway wholly within the State of Texas, beginning at the northwest corner of the American Petroleum Company's terminal property; thence to extend in a westerly direction to intersect with the Municipal and Harbor Belt Railroad in the northeastern part of the City of Houston, a distance of approximately five (5) miles, all within the County of Harris and said State, and said respondent has instituted or caused to be instituted a certain condemnation suit in the County Court at Law of Harris County, Texas, against complainant for the purpose of condemning and acquiring a right of way of one hundred feet (100') in width and of a length of eleven hundred and twenty-seven feet (1127), comprising an area of two and 587/1000 (2.587) acres of land, belonging to complainant and being a part of the Ezekial Thomas League in said Harris County, Texas, and is threatening to go upon and is about to go upon the said lands of said complainant and construct thereon an embankment and a railroad track, or tracks all to complainant's damage exceeding the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

V

That the said respondent is about to extend, construct and operate said line of railroad and to engage in trans- [fol. 7] portation under the said Interstate Commerce Act and said Transportation Act of 1920 by means of such line of railroad without having obtained from the Interstate

Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of said line of railroad; that the said respondent has never applied to said Interstate Commerce Commission for any such certificate and has never obtained from said Interstate Commerce Commission any such certificate, nor has the Interstate Commerce Commission ever issued any certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of said line of railroad, and complainant, upon information and belief, alleges the fact to be that neither the present nor future public convenience or necessity require or will require the same; that the said line of railroad is not a spur, industrial, team, swtiching or side track, or a street, suburban or interurban electric railway within the meaning of Subdivision 22 of Section 1 of said Interstate Commerce Act as amended, but is a terminal railway for the transportation of freight as a common carrier for the public.

VI

That this is a suit which arises under the Constitution and Laws of the United States and complainant herein is a party in interest, to-wit: the owner of a tract of land sought to be condemned and crossed by the said respondent in the construction and operation of the terminal railroad aforesaid, and unless the said respondent shall be enjoined and restrained from prosecuting the said condemnation [fol. 8] suit and from constructing, maintaining and operating the said line of terminal railway upon and across complainant's property, which it requires for its own corporate purposes, the said complainant will suffer great and irreparable damage, for which it has no remedy at law.

Premises considered, complainant prays that upon hearing hereof this Honorable Court issue its most gracious writ of injunction, enjoining and restraining the respondent herein, its attorneys, officers, agents, servants and employees, from prosecuting the said condemnation suit and from constructing, maintaining or operating the terminal railroad aforesaid upon or across the property of the complainant herein.

And complainant further shows to the Court that the said respondent is now actively preparing to press the said condemnation suit to trial and to construct, maintain and operate the said terminal railroad upon and across the complainant's property and, unless immediately restrained and prevented therefrom by a restraining order issued by this Honorable Court, will accomplish it [its]—said purpose before this cause or complainant's application for an injunction can be set down and heard.

Wherefore, complainant prays the Court that it forthwith enter its temporary restraining order restraining the said respondent until further hearing hereof from doing any of the things herein sought to be enjoined.

Baker, Botts, Parker & Garwood, Garrison & Watson, Attorneys for Complainant.

[fol. 9] *Duly sworn to by G. S. Waid. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

AGREEMENT AS TO ORIGINAL EXHIBITS AND ORDER THEREON—Filed October 6th, 1925

All parties to the above styled and numbered cause, by and through their respective counsel, hereby agree that all [fol. 10] of the original maps introduced in evidence may be sent up as a part of the record in this cause.

Garrison & Watson, Baker, Botts, Parker & Garwood, Attorneys for Texas & New Orleans Railroad Company. Nelson Phillips, W. W. Moore & J. Y. Powell, Attorneys for North Side Belt Railway Company.

Upon consideration of the foregoing agreement, the Clerk is directed to send with the Transcript of Record in this case, all Original Maps introduced in evidence on the trial of this case.

J. C. Hutcheson, Jr., Judge United States District Court.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 11, 1925

To the Honorable J. C. Hutcheson, Judge of said Court:

Northside Belt Railway Company, Respondent in the above styled and numbered cause, for answer therein represents to the Court:

I

Respondent admits the allegations contained in paragraph I of the Bill of Complaint.

[fol. 11]

II

Answering paragraph II of the Bill of Complaint, Respondent admits that it is incorporated under and by virtue of the general laws of the State of Texas, by charter filed in the office of the Secretary of State of Texas on March 31st, 1925, having corporate powers and purposes of constructing, owning, maintaining and operating a terminal railway wholly within the County of Harris in the State of Texas, extending from a point near the northwest corner of American Petroleum Company's property, in a westerly direction a distance of about five miles to a connection with the Municipal and Harbor Belt Railroad in the northeastern part of the City of Houston; and that as such corporation it has the right under laws of Texas to condemn property of others for its use as a right-of-way for its said line of railroad.

III

Respondent denies the allegations contained in paragraph III of the Bill of Complaint and alleges that it is wholly and solely an intra-state railroad Company within the State of Texas.

IV

Respondent denies all of the allegations contained in paragraph IV, of the Bill of Complaint, except as may be hereinafter admitted; and further answering said paragraph, Respondent alleges that as such corporation aforesaid, and acting under authority of the State of Texas, it

proposes to construct and is engaged in the construction of the line of intra-state railroad before described, in the course of which it became expedient and necessary to cross [fol. 12] certain property of complainant in Harris County, Texas; that upon permission therefor, being refused by Complainant, Respondent proceeded to and did institute condemnation proceedings therefor in the County Court at Law of Harris County, Texas, in due accordance with the law pertaining thereto, for the purpose of condemning and acquiring for its corporate use a right-of-way one hundred (100) feet in width and eleven hundred twenty-seven (1127) feet long, comprising an area of two and five hundred eighty-seven thousandths (2.587) acres of land then belonging to complainant and being a part of the Ezekial Thomas League in Harris County, Texas; that such condemnation proceedings were prosecuted and resulted in due course in said right-of way being duly condemned and awarded to Respondent in accordance with the law, on the 13th day of June, 1925; that Respondent having condemned said right-of-way and having procured an award by appraisers appointed by the Court, thereupon deposited the requisite sum of money to guarantee Complainant's damage as provided by law, and also executed and filed bond in the terms of the law, which was duly approved. Thereupon Respondent became entitled to the possession and use of said property. That all of these proceedings were had before the filing of this suit. Thereupon, being entitled under the law to take possession of said right-of-way, Respondent did take possession of same and has since remained in that possession; and being unrestrained by any order or writ of this Court, it constructed its track along and over said right-of-way prior even to the service upon it of this Court's order to herein show cause why an injunction should not issue, which track and line of railroad authorized by Respondent's corporate charter is now extant on and across Complainant's said land, by due authority of the laws of the [fol. 13] State of Texas; wherefore, the question and issue raised by Complainant's Bill of Complaint have become moot and present no ground for the equitable relief herein sought by Complainant.

V

Respondent denies all and singular the allegations of paragraph V of the Bill of Complaint—except as may be hereinafter admitted; and alleges that the connection with any other railroad which it contemplates making and expects to make is with the Municipal and Harbor Belt Railroad, a railroad and carrier owned by and chiefly within the City of Houston, Texas, and which is not engaged in interstate commerce and is not under the supervision or regulation of the Interstate Commerce Commission, and is not by law subject to its supervision or regulation; that Respondent has not and is not in any way engaged in transportation of commodities in interstate commerce or otherwise as a common carrier. Respondent alleges, by reason of the premises, that neither it nor its line of railroad and business operations are governed and controlled by said Interstate Commerce Act, as amended, or by said Transportation Act of 1920, nor are they subject to the jurisdiction of the Interstate Commerce Commission.

VI

Respondent denies all and singular the allegations of paragraph VI of the Bill of Complaint, and alleges that this suit does not arise under the constitution and laws of the United States for the reasons, as stated in the preceding paragraphs hereof, that Respondent and its line of railroad and its operations are not within the terms of and are [fol. 14] not governed and controlled by the Federal Interstate Commerce Act or by the Transportation Act of 1920. Respondent further alleges that if said Federal Interstate Commerce Act or said Transportation Act of 1920, be held to apply to Respondent and its properties and its operations pursuant to its charter powers, they and each of them, exceed the powers which under the Constitution of the United States are conferred on and can be exercised by Congress and are unconstitutional and void.

VII

Wherefore, Respondent having fully answered herein prays that Complainant's Bill of Complaint be dismissed and that Respondent be hence dismissed with its costs.

Nelson Phillips, W. W. Moore, Beeman Strong, J. Y. Powell, Solicitors for Respondent Northside Belt Railway Company.

Duly sworn to by W. H. Mead. Jurat omitted in printing.

[fol. 15] IN UNITED STATES DISTRICT COURT

OPINION—Filed September 26, 1925

This is an action, brought by the Texas & New Orleans Railroad Company, a party at interest, to enjoin the North Side Belt Railway Company from constructing its railroad on the North side of the Houston Ship Channel.

The record consists mainly of an agreed statement of facts together with the testimony of Mr. Cullinan, President of the defendant railroad, the effect of which agreed statement and testimony is that the Northside Belt Railway Company chartered under the laws of Texas for the purpose of "constructing, owning, maintaining and operating a terminal railway" the main line of which should be constructed 'commencing at' the Northwest corner of the American Petroleum Company's terminal property then extend in a westerly direction where the proposed line would intersect the Municipal & Harbor Belt Railroad a distance of approximately five miles and located wholly within Harris County, Texas."

[fol. 16] That the Northside Belt Terminal Railway Company has never procured a permit from the Interstate Commerce Commission for the construction of its road. That the proposed line will connect with the private spur track of the American Petroleum Company which spur track serves its terminal located on the Houston Ship Channel. That the Municipal & Harbor Belt Railroad with which it will also connect, was built by and is owned by the City of Houston and handles both interstate and intrastate freight

connecting with the other main lines of the different roads, entering the port. That this Belt Railroad is operated by a joint association composed of various main line rail roads entering Houston. That during the month of June, 1925, fifty per cent of the freight handled from twelve of the most important industries situated along the channel was interstate freight.

That on or about the 8th day of June, 1925, the respondents duly filed this proceeding for the purpose of condemning a right of way across the land of the complainant. That such proceedings were duly prosecuted resulting in an award to the complainant of $750. That following the condemnation proceedings respondent took possession of the land in question on the 13th day of June, 1925, and laid a track across it and is now in possession of same.

That immediately after the condemnation proceedings were completed, construction of the railroad was commenced across complainant's property and was completed at about 11 o'clock P. M. on the date of the condemnation proceedings.

Mr. Cullinan testified that when the road was completed it was intended to be operated. That he is interested in the Galena Signal Oil Company and the American Petroleum Company. That those companies are both engaged in [fol. 17] the shipping and exporting of oil from points outside the state of Texas, and that they have private industrial tracks of their own. That the complainant serves the Galena Signal Oil Company and through it the American Petroleum Company. That this Northside Belt Railroad was being built to give facilities which were needed there and which ought to have been earlier built, and which the witness and those associated with him were undertaking to do because others had failed to do. That it was intended to make the industrial tracks owned by the American Petroleum Company a part of the Northside Belt Railway and when the work was completed to have a complete connection through the Northside Belt Railway with the Municipal Belt for those plants.

That when the Northside Belt Railway was finished they expected it to be operated as a terminal railroad, with all the rights and powers which its charter gave it. That the T. & N. O. is the only railroad that operates a line down to

the western terminus of the Galena Signal and when the Northside Belt was finished it would give these properties a connection with the Municipal Harbor Railroad.

Whether the injunction prayed for should issue or not turns upon the single question whether the Transportation Act of 1920 invoked by complainant, applies to the construction by a new railroad corporation, of a physical railroad track before it becomes engaged or offers to engage in the actual transportation of interstate freight and passengers.

Respondent contends that Sections 18 to 22 of the Transportation Act do not apply to the construction of a newly constructed road, but only apply to common carriers engaged in interstate commerce at the time of the enactment of the Transportation Act of 1920, or to new carriers when [fol. 18] and after they become impressed with an interstate character, while upon the part of complainant it is contended that a new railroad cannot construct a new line of railroad wholly interstate.

In other words, that the Act gives to the Commission jurisdiction over any railroad construction, although entirely intrastate and wholly incapable of doing an interstate business until its road has been completed.

Apart from the plain language of the Act, which I think is in accord with defendant's contention that it only relates to carriers engaged in interstate commerce, I think it plain that every principle of constitutional and statutory construction denies the Act the effect contended for by complainant.

It must be admitted that the Act is far reaching in its intendment and that insofar as it gives jurisdiction over railroad construction by wholly intrastate railroads actually engaged in interstate commerce, it is more imperial than even the strictest Federalist of the early days in their fondest hopes ever dared forecast.

Well shotted as this new arm of interstate commerce is, however, it has not been and cannot be drawn to so fine a bead as to bring within its comprehensive aim the fledgling railroad in the case at bar, for however exclusive the power of Congress over interstate commerce and however free from interference by states such commerce is, state laws touching and state contacts with actual physical properties lying wholly within the state can not, under the guise of

interference with interstate commerce, be avoided unless such laws really and substantially, not technically and by fancy affect such commerce.

A familiar illustration of that principle is found in the long line of cases, summarized and given effect to in Sonneborn Bros. vs. Cureton, 262 U. S. 507, which establishes [fol. 19] that the commerce clause of the Constitution makes void and ineffective state laws and state regulations only where there is a definite interference with and a burden upon interstate commerce.

In short, that the commerce clause must be given a practical and reasonable and not a technical application.

Holding the view as I do, that the construction of this railroad neither directly nor indirectly burdens or interferes with, affects or is affected by interstate commerce in its present state, and that the Act invoked therefore has no application, it follows that the injunction prayed for will be denied without prejudice to the right of complainant to again apply when and as the activities of the defendant bring it within the purview of the Act.

Let a decree be prepared accordingly.

J. C. Hutcheson, Jr., Judge.

In United States District Court

Decree—Filed October 6, 1925

This cause having come on to be heard finally on the 15th day of July, A. D. 1925, upon pleadings and proof, the complainant, the respondent and the interveners being represented by their respective solicitors; and the Court being fully advised in the premises and an opinion having been herein filed.

[fol. 20] Now therefore, in accordance with said opinion it is ordered, adjudged and decreed that the injunction prayed for in the bill of complaint and in the respective bills of intervention be and it is hereby denied and that the bill of complaint and the respective bills of intervention be and the same are hereby dismissed, with costs to the respondent, to be taxed against the complainant and interveners.

This decree is without prejudice to the right of the complainant and interveners to hereafter apply for an injunction against the respondent if its activities in the future shall bring it properly within the purview of the Act of Congress known as the Transportation Act of 1920.

To all of which the Complainant and interveners in open Court except and give notice of appeal to the United States Circuit Court of Appeals at Fort Worth.

This 6th day of October, 1925.

J. C. Hutcheson, Jr., Judge.

IN UNITED STATES DISTRICT COURT

APPLICATION FOR RESTRAINING ORDER AND STAY—Filed October 1, 1925

To the Honorable J. C. Hutcheson, Judge of said Court:

Now comes the Texas & New Orleans Railroad Company, plaintiff herein, and moves the Court that pending [fol. 21] the appeal from the Court's judgment of date September 28, 1925, denying plaintiff's petition for writ of injunction, that your Honor grant a restraining order in this cause to be continued in full force and effect, or that the Court may by proper order, or otherwise, maintain the status quo until such appeal shall be decided; and for cause plaintiff would show that it filed in this Court its petition praying for an injunction against the defendant, North Side Railway Company, restraining it from building and constructing a railroad in the County of Harris and State of Texas, over and across its property beginning at the Northwest corner of an industrial railroad track owned and operated by the American Petroleum Company and thence in a Westerly direction where it connects with the Municipal Belt Line Railway Company, alleging among other things that said Railroad, when constructed, will engage in interstate commerce and that the construction of said railroad will necessarily force and compel it to engage in interstate commerce, and that the construction and operation of said railroad will materially affect the earning capacities and revenues of the Texas & New Orleans Railroad Company.

The petition of plaintiff alleges that the defendant North Side Belt Railway Company has never applied to nor procured a permit from the Interstate Commerce Commission authorizing it to build, construct and operate said railroad, and plaintiff seeks to enjoin the building and construction of such railroad until it procures a permit from the Interstate Commerce Commission under Sections 18 to 22 of the Transportation Act of 1920.

That on the trial of said cause this Honorable Court denied said writ of injunction upon the ground that the Transportation Act of 1920 did not apply to a railroad con- [fol. 22] structed subsequent to the passage of said act and applied only to such railroad that was actually engaged in interstate commerce at the time of the passage of said act; that the plaintiff, Texas & New Orleans Railroad Company has perfected its appeal from the decree of the United States District Court to the United States Circuit Court of Appeals for the Fifth Circuit, holding at Forth Worth, Texas; that the United States Circuit Court of Appeals will convene at Fort Worth, Texas, in November, 1925—and that the defendant, North Side Belt Railway Company will not be materially injured or damaged by reason of the issuance of such order restraining it from the construction and completion of said road pending said appeal; that the rights of the plaintiff will be materially affected should the defendant North Side Belt Railway Company be allowed to construct and complete said road before the final judgment of the United States Circuit Court of Appeals is entered, passing upon the question of facts and law determined by the District Court, which will probably affect the final termination of said cause, and thus deprive the plaintiff Texas & New Orleans Railroad Company of its rights to have the matters in controversy properly adjudicated and passed upon by the Appellate Court.

Plaintiff now offers to enter into such bond or otherwise conform to such directions in the matter expediting the appeal as the Court shall offer, as condition of awarding the restraining order and stay herein applied for.

Texas & New Orleans Railroad Company, by Baker, Botts, Parker & Garwood and Garrison & Watson, Its Attorneys.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER DENYING APPLICATION FOR STAY—Filed October 6, 1925

On this 6th day of October, 1925, came regularly on to be heard the application of the plaintiff for a stay order, pending the appeal from this Court to the United States Circuit Court of Appeals for the Fifth Circuit, holding at Fort Worth, Texas; and the Court having heard said application and being advised of the premises is of the opinion that the same should be and the same is hereby denied, to which ruling of the Court the plaintiff then and there in open Court duly excepted.

J. C. Hutcheson, Jr., United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed October 6, 1925

To the Honorable J. C. Hutcheson, Judge of said Court:

And now comes the Texas & New Orleans Railroad Company, complainant, by Garrison & Watson, its attorneys [fol. 24] and feeling itself aggrieved by the final decree of this Court entered on the 28th day of September, A. D. 1925, hereby prays that an appeal may be allowed to it from the said decree to the United States Circuit Court of Appeals for the Fifth Circuit at Fort Worth, Texas, and in connection with this appeal, petitioner herewith presents its assignments of error.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the case, and the amount of security may be fixed by the order allowing this appeal.

Texas & New Orleans Railroad Company, by Baker, Botts, Parker & Garwood and Garrison & Watson, Its Attorneys.

Now, to-wit, on the 6th day of October, 1925, at Houston, Texas, it is ordered that the appeal prayed for in the fore-

going petition be, and the same is hereby allowed as therein prayed for.

J. C. Hutcheson, Jr., United States District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed October 1, 1925

Now comes the appellant Texas & New Orleans Railroad Company, by Garrison & Watson, its attorneys and in con- [fol. 25] nection with its petition for appeal, says that in the record proceedings and in the final decree aforesaid, manifest error has intervened to the prejudice of appellant, to-wit:

I

The Court erred in not holding that the bill of complaint as well as the evidence introduced upon the trial states facts, sufficient to constitute a cause of action and in denying and refusing appellant's petition of an injunction.

II

The Court erred in not finding the following facts:

That the Eastern terminals of the North Side Belt Railway Company, which begins at the Northwest corner of the American Petroleum Company's property and connecting with the North end of the industrial track of the American Petroleum Company and extending south to the ship channel; that the Industrial track owned by J. S. Cullinan, President of the North Side Belt Railway Company, which is carried in the name of "John Doe," forms a part of the North Side Belt Railway Company and extends from the Eastern terminus of the North Side Belt Railway Company to a connection with the industrial track of the Galena Signal Oil Company, which industrial track connects with the Texas & New Orleans Railroad Company where interstate freight is both received and delivered; that *that* a portion of the North Side Belt Railway Company, beginning with the industrial track owned by the Galena Signal Oil Com-

pany and extending East to where it connects with the track of the American Petroleum Company, has been used and was being used prior to the filing of appellant's complaint herein, for the purpose of receiving and delivering inter- [fol. 26] state freight to and from the Texas & New Orleans Railroad Company.

III

The Court erred in holding that Sections 18 to 22 of the Transportation Act of 1920 do not apply to the construction of a new road, but only apply to common carriers engaged in interstate commerce at the time of the enactment of the Transportation Act of 1920.

IV

The Court erred in holding as a matter of law that the Transportation Act of 1920 does not apply to new carriers whose line of railroad lies wholly within the State until the new carrier becomes impressed with an interstate character.

V

The trial Court erred in holding that the Transportation Act of 1920 does not give to the Interstate Commerce Commission jurisdiction over any railroad constructed, when its railroad tracks lie wholly within the State of Texas, until said railroad is completed and begins doing an interstate business.

VI

The Court erred in holding that the construction of the *the* North Side Belt Railway neither directly or indirectly burdens or interferes with, affects or is affected by interstate commerce until the completion of said road and until [fol. 27] it actually begins the handling of interstate commerce.

VII

The Court erred in decreeing that the plaintiff was not entitled to the injunction prayed for, for the reason that the Transportation Act of 1920 did not apply to a road that was being constructed and until the completion of the road, and it was actually engaged in interstate commerce.

VIII

The decree is against the manifest weight of the evidence.

IX

The decree is contrary to law.

X

The Court erred in refusing to grant the application of complainant, Texas & New Orleans Railroad Company, for a temporary injunction restraining the respondents, North Side Belt Railway Company, et al., from building or continuing to build or construct its road bed and track, as prayed for in complainant's original petition pending said appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at Fort Worth, Texas.

Wherefore, appellant prays that the decree of the United States District Court for the Southern District of Texas [fol. 28] may be reversed, and that this Honorable Court grant the writ of injunction prayed for, or direct said District Court to grant said writ.

Texas & New Orleans Railroad Company, by Baker, Botts, Parker & Garwood, Garrison & Watson, Its Attorneys.

In United States District Court

Supplemental Assignment of Error—Filed October 6, 1925

Now comes the plaintiff, Texas & New Orleans Railroad Company and files this its Supplemental Assignment of Error.

The Court erred in refusing plaintiff's application for a stay order, pending final determination of this cause in the Circuit Court of Appeals.

Baker, Botts, Parker & Garwood, Garrison & Watson, Attorneys for Plaintiff.

[fols. 29 & 30] Bond on appeal for 250.00 approved and filed October 6, 1925 omitted in printing.

[fol. 31] In United States District Court

Waiver of Citation—Filed October 6th, 1925

Now comes the defendant, North Side Belt Railway Company, by and through its counsel, and waives the issuance, service, and return of citation on the order of the Court allowing an appeal in favor of the plaintiff, Texas & New Orleans Railroad Company, in the above numbered and entitled cause.

Nelson Phillips, W. W. Moore & J. Y. Powell, Attorneys for North Side Belt Railway Company.

In United States District Court

Statement of Facts—Filed November 10, 1925

Be it remembered, that upon the hearing of the above entitled matter before Hon. J. C. Hutcheson, Jr., on the 15th day of July, A. D. 1925, the following evidence was adduced, to-wit:

Agreement of Facts

Agreement: It is agreed that on the 23rd day of March, 1925, the Northside Belt Railway Company filed with the [fol. 32] Secretary of State of the State of Texas its charter, copy of which is attached, marked Exhibit No. 1.

That the Northside Belt Railway Company has never procured a permit from the Interstate Commerce Commission, as evidenced by attached instruments, marked Exhibit No. 2.

That the proposed line begins at the Northwest corner of the American Petroleum Company's terminal property, there connecting with the private spur track of the American Petroleum Company, which serves its terminal location on the Houston Ship Channel. That it extends in a

Westerly direction where the proposed line will intersect the Municipal & Harbor Belt Railroad. That the Municipal & Harbor Belt Railroad is built and owned by the City of Houston, and handles both interstate and intrastate freight, connecting with the other main lines of the different roads entering the port; that the Municipal & Harbor Belt Railroad is operated by a joint association composed of various main line railroads entering Houston, as per copy of contract attached, marked Exhibit No. 3.

That the attached statement as to business to and from the channel industries during the month of June, 1925, is a correct statement, as far as it goes, but Respondents insist, however, that this is not competent or relevant. This statement is attached hereto and marked Exhibit No. 4.

That on or about the 8th day of June, 1925, the Respondents, in accordance with law, duly filed their proceedings for the purpose of lawfully condemning a right of way across the land of the Complainant, as described in Complainant's Bill. That thereafter such proceedings were duly prosecuted, resulting in an award to the Complainant, in the amount of $750.00. The amount required by law was thereupon by Respondent deposited as required by law with [fol. 33] the Clerk of the Court, and Respondent duly filed the bond required by law in such cases, which was duly approved by the Court, in all things complying with the law of the State of Texas with respect to the condemnation by it as a railroad company of the land in question. That following this, Respondent did take possession of the land in question and on the 13th day of June, 1925, did lay a track across said land, and is now in possession of same thereby, subject to the determination of this suit. That in the condemnation proceedings above referred to, the Complainant participated through counsel and entered its appeal from the final order making the award above referred to.

That immediately after the condemnation proceedings were completed, respondent's counsel advised the engineer in charge of the construction of the railroad that the right of way was available and he proceeded to construct the railroad, completing same about 11 P. M. on the date of the condemnation proceedings. That Mr. W. W. Moore, counsel for Respondent, had information that the applica-

tion for injunction had been made by Complainant and through associate counsel, Mr. Arnold, learned that no restraining order of any kind had been issued. That Mr. Moore accordingly advised the engineer in charge of construction that it was legal for him to proceed with such construction.

That the facts above agreed to apply as well to the interveners and their property as to the controversy between strictly Complainant and Respondent.

It was also agreed that the charter (of the Northside Belt Railway) was applied for, the construction was undertaken and is going on with the idea of completing and finishing the railroad called for in the charter and when completed with the idea and intention of operating the railroad.

[fol. 34] J. S. Cullinan, a witness called by Complainant, testified as follows:

I was not one of the incorporators of this Northside Belt Railway. I am now an officer of the road. I hold the office of President, and am a director. I represent as President a corporation that has a large financial interest through stock in the Galena Signal Oil Co. I am not personally interested in the Galena Signal Oil Co. I may have a few shares of stock personally but I am interested in one of the largest financial interests in the Galena Signal Oil Co. The American Petroleum Co. is a subsidiary of the American Republic Corporation, of which I am President. The Galena Oil Co. and the American Petroleum Co. are in the oil business. They both ship and export oil. Both of those concerns ship oil from their plant and receive oil to their plant from points outside of the State of Texas. I should say only a very small portion of the product of the oil received by them is received from outside of the State. The disposition and sale of our oil from those two concerns is to other states of the Union and foreign countries as well as Texas.

The Galena Signal Oil Co. has several miles of privately owned industrial tracks on its property. The American Petroleum Co. has several miles of tracks which it owns, part of which is on its own property and part of it is on

the Federal Investment Company's property, the greater part being on the Federal Investment's.

With reference to the American Petroleum Co.: The process is, in handling oil in by rail, to pump the oil from the cars and deliver it into storage, into steel tanks. By "storage" I mean steel storage tanks. I do not think we handle it from the cars into barges or boats. I am quite [fol. 35] sure it would be impracticable. I tried to make it clear that the oil would move from the car to storage. Then it could move from storage into either cars back again or to barges or to ships. These storage tanks which we have there are for the purpose of collecting our oil and maintaining stock.

There is a rail connection between the Galena Signal Oil Co. and the American Petroleum Co. over the Federal Investment Company's property, that is owned by myself. The western terminus of it connects with the Galena Signal Oil Company's privately owned industrial track. At its eastern terminus it connects with the American Petroleum Company's privately owned track.

The T. & N. O. Railroad Company has been serving up to now and is still serving the Galena Signal Oil Company, it delivers freight in and out of the Galena Signal Oil Company. It receives freight. If there were 20 or 30 cars of oil delivered to the Galena Signal Oil Co. by the T. & N. O. R. R. Co., the Galena Company would put it on an unloading track, it would connect the unloading line with the cars and with pumps or by gravity that oil would run to the point of the pumps or the gravity basin and then be transferred from there to either storage—If the T. & N. O. R. R. Co. were to deliever 30 cars of oil to the Galena Signal Oil Co. at its terminus at the Galena Signal Oil Company's plant, as now located, and if we were unloading that oil, if the oil was consigned to the Galena Signal Oil Company, you would put the cars, spot them on the switch, connect them with suitable outlet pipes and through those pipes you would carry it to the pump and from the pump you would deliver it into the storage tank.

These properties are two miles or more apart. Now, of course, the Galena Signal Oil Co. is one company and the [fol. 36] American Petroleum Co. is quite another. If it was to be carried to the American Petroleum Co. it would

necessarily have to move over certain rails down to their -racks but when he says broadly the "ship channel" and asks the question broadly about where and how it should move, I can't answer that question intelligently.

The movement of those cars all goes by either pipe line or rail until it gets to the water side. If, at this time and prior thereto, a car of oil should be shipped to the American Petroleum Co., the oil will come consigned to the American Petroleum Co. at Galena, which is a station on the T. & N. O. Road. It would be taken up by the Galena switch engine and then carried over the rails of the Galena Signal Oil Company's private industrial tracks to a point where it would intersect the road, the piece of road which I own, and there would be delivered from that down to the American Petroleum Company's tracks, which are owned by the American Petroleum Company and delivered to its storage tanks.

There is no oil consigned to the Galena Signal Oil Co. which is stored in the American Petroleum Company's tanks or storage. I couldn't answer how I would get it done if I wanted to do it.

This road which I have chartered and which is in controversy, the Northside Belt Railway Company, begins at the Northwest corner of the American Petroleum Company's property. The charter we have secured authorizes us to build a road from the Northwest corner of the American property too, but we haven't exercised that privilege, so far as that particular part of the road is concerned.

This private road or industrial track from the Galena Signal Oil Company connects with the industrial track of the American Petroleum Co. at the Northwest corner of the American Petroleum Company's property. Start- [fol. 37] ing from that corner, we built in a westerly direction. At the western terminus we are connected with the Galena Signal Oil Company's private industrial track.

The purpose of building the road is to serve the industries that we have established on the Houston Ship Channel and such other industries as might build on our own properties. When I say "our," I mean the Federal Investment property which is owned by the Autrey estate and myself, and to serve anything else that may come along that line and to give access to all of the railroads that enter Hous-

ton to that territory. And it is the result of committals that I have been making in Washington before the Congressional Committees, before the War Department, and to industries for 15 to 20 years on the authority of practically, I believe, every Mayor of the City of Houston. That's the purpose behind it.

There are no other industries located on this proposed line other than ours at the moment, and we have held the property for 10 years trying to get other industries on there and were unable to do so because we were not served by the rail lines. As President of the road, if it is constructed and operated, we are to operate it for the public and for the handling and accepting of cars that might be tendered us. We will surely accept cars tendered to us, if we operate the road. I expect to see that the road is operated. I should naturally assume that in the operation of the road it will develop into carrying cars holding interstate business. The record I had when I left here in May was that we had then contracted to move into that terminal approximately 700 cars. We expected to get those cars at various points in Oklahoma, Louisiana, and Arkansas. I would not be prepared to state how many cars, during the month of June, [fol. 38] we received from the T. & N. O. and carried over these industrial tracks to the S. P. Channel, because I haven't the information. We begun doing it in May or June.

It is a fact that we intend and it is so understood that this industrial track or privately owned track connecting with the Northwest corner of the American Petroleum Co. and extending down to the Galena Signal Oil Co. will be made a part of this railroad, or another track that would be built parallel to that track would be made part of the Northside Belt Railroad. Of course, we have room there for four tracks. There is no understanding, except my own, as to consolidation or becoming a part of that road. We have done no grading from the northwest corner of the American Petroleum Company's down to the Galena Signal Oil Co. for the Northside Belt Railroad. We started our grading for that railroad at what we call the trestle or the junction of the Galena tracks with the eastern end. We are grading

it toward the west. We have graded and got our rails located across the property of the T. & N. O.

In running a car or an engine over the property of this chartered railroad from the property of the T. & N. O. to the American Petroleum Company, we would follow the rails that were laid through to the American Petroleum. We have got a connected track clear through. Between the Galena Signal Oil Co. and the American Petroleum Co. we have two grades as a matter of fact, either of which we may use, or both; as to whether we use one or the other or have two tracks on there is not certain, but we have two grades made at the present time. I can't state whether I want the Court to understand that we are not going to use this private track as a part of this chartered railroad company. I don't know what we may do. That is a matter of negotiation with others that are involved, with a number of factories, that I could not foresee or forecast here.

[fol. 39] The Belt Road covered by this charter is not at present finished; we have just started it. We know where we are going to. We are aiming to fulfill as I stated the obligations that we have been making all these 15 or 20 years by building a track that will serve that territory. I have a little map here that would facilitate us in getting an idea that will show exactly where that is located and how, because it is more or less of an involved subject.

Complainant thereupon introduced the map as Exhibit No. 5, same being attached hereto.

This corporation of which I am now the President, known as the Northside Belt Railway, and chartered by the State of Texas under that name to operate as a terminal railway, will under my administration or under those who may succeed me, when finished, operate as a terminal railroad with all the rights and powers which it has under this charter without reference as to whether the freight comes from State or Interstate.

I had this road which is owned by myself built in the name of John Doe. It stands as John Doe, but I have put up the money for it. It is still in the name of John Doe, or in my name, I am not sure about that, but it was built in the name of John Doe.

On cross-examination, he testified:

The Northside Belt Railway Company is not now operating any railroad whatever. It is not operating the track which connects the private industrial track of the Galena Co. with the private industrial track of the Petroleum Company. The Galena Co. are using their power to transfer [fol. 40] the cars back and forth between the American and the Galena. That little stretch of track there between the industrial track of the Galena and the industrial track of the American Petroleum Co. is something less than a mile. This is on land which is owned by Mrs. Autrey, her daughter and myself. The title to the property then, including the tracks on the ground, is still in the owners. The land is still in the owners. That section of track was built in the name of John Doe with the understanding that I would put up the money for payment, which I have done. It does not belong to the Northside Belt Railway Company. At the moment, it is being used simply in connection with the industrial track of the Galena Co. and the American Petroleum Co. That stretch of track which connects these two industrial tracks was authorized in November, to be built. The Northside Belt Railway was chartered in March: This track was built at that time in March, I am quite sure; I am not positive about that, but I am quite sure that it was completed.

I am not prepared to say whether or not that track which connects those two industrial tracks there will be a part of the trackage of the Northside Belt Railway Co., but I hope so. It doesn't belong to it and it is not now operated by it. The Northside Belt Railway Company is not now engaged in any character of commerce whatever. I have no kind of commitment or agreement of any character or kind with any railroad company, corporation, individual, or anyone else on earth, with respect to the receiving or transporting of interstate freight or passengers, though I hope, of course, to make such arrangements at a later time: That is all a matter for the future. That may or may not come about. I have no means of knowing now, except expectation or hope, that we will ever carry any interstate freight on that road, or not.

[fol. 41] The inspiration for constructing this railroad dates back to commitments that I and others have made in

Washington and elsewhere on the authority of the City of Houston and this community and we have made some very serious commitals to industries five or six years ago that have never been carried out by the City of Houston or this community.

Illustrating the point then, as I understand it now, on the 160 acres that's owned or leased by the American Petroleum Co. in which they have invested a very large amount of money, that investment has been standing practically idle for from five to six years. We have looked on representations, if I may interject that much in, of certain people here that they would build a railroad down there, we waited all that time with all this large investment, finding that it was not done. We found it necessary in order to take care of the business that we had in the interior, in Oklahoma, in Texas, in Arkansas, that was offered us on the one side, and the outlet in Europe and on the East Coast on the other side, to proceed with the carrying out of the details made to build a railroad down there to our own plant and a railroad that would be available to other lines and might serve any other industry that would come in.

There was a condition down there which I regarded as needing to be served and on that account planned this railroad. Not only as to our plant, but prospective traffic. I had a purpose in building the road to serve traffic which would come in as soon as they had facilities to our own industries and others which would naturally locate on the ship channel. There are other industries on the north side of the channel besides our own, a number of them. The chief industries are, beginning at the south, or I should have said, beginning at the East, the American Petroleum [fol. 42] Co., the next is the Galena Signal Oil Co., the next is the refinery of the Keen-Wolfe Co., and then there are various small industries between there and the Turning Basin. The Texas Co. has a plant down there. That property is practically undeveloped beyond the Galena Signal Oil Co. On that side of the channel, the T. & N. O. operates down to the West line of the Galena Signal Oil Company's property. I understand it to be a part of the Southern Pacific System. That's the only road at the present time that serves that territory, excepting the Municipal Belt Railroad comes to its docks. The American Petroleum

Co. is a pipe line, storer and buyer and seller and handler of oil by cars and ships and pipe lines. It has a large storage facility there; I believe 18 tanks of mainly 55,000 barrels capacity. It stores a great quantity of oil. The Northside Belt Railway Company when completed will be approximately 5 miles long.

E. A. O'DONNELL, called as a witness for Complainant, testified as follows:

I live here in Houston. Am Superintendent of Terminals for the Southern Pacific. I am familiar with the Company's property down here on the channel, around the Galena Signal Oil Co. The Texas & New Orleans' corporate property traverses the North side of the channel, as far as the west side of the Galena Signal Oil Company's property. That is the T. & N. O.'s private property that I spoke of. The Port Terminal Railroad Association is a company operating a company or what I believe is known as the Municipal Belt, a Houston owned railroad serving industries adjacent to the channel. It is not operated by the City, the cost of the operation is pro rated by the main [fol. 43] line carriers entering Houston on a per car basis. The Municipal Belt Railroad is all operated by one operating company but the expense is borne by the various carriers. And it is operated that way. A check of the business to and from 12 of the most important industries situated along the channel on both sides for the month of June indicated that a little over 50% was interstate traffic in and out. I just examined the records for June. I took the most current month. I did not examine any more records. I have a statement here showing about what it is. I made it.

I am familiar with that map. No such railroad as this "Port Navigation," which is supposed to be a railroad there, exists at the present time parallel with the T. & N. O. There is no such railroad, there might be a proposed right of way but there is no railroad. Beginning from this point, the northwest corner of the American Petroleum Co., this parallel red line shows the proposed road of the Northside Belt Company, being built by Mr. Cullinan. I

believe it is proposed to intersect the Port Terminal Co. up here. I know of the railroad as it exists as far as where it crosses the T. & N. O. Railroad track. I say, I know of this Northside Belt Railroad as far as it exists over and across the T. & N. O. property. I don't know of their line beyond that except from hearsay, that they propose to go some place and connect with the Port Terminal Railroad. With reference to the T. & N. O. property down there, this bayou or the channel, that is properly and correctly shown there.

A. R. Atkinson, called as a witness by Complainants, was sworn and testified as follows:

I am Assistant General Freight Agent of the Southern Pacific:

[fol. 44] I am acquainted with the Houston Belt & Terminal Co. I know where that property is situated. I could not tell you whether or not it extends beyond the limits of Harris County or not. My understanding is it is a Terminal Co., the Houston Belt & Terminal Co. that serves the tracks here. The Houston Belt & Terminal Co. file their tariff covering interstate business with the Interstate Commerce Commission. I have a copy of it here.

Complainants thereupon introduced the tariff identified, which is attached hereto, marked Exhibit No. 6.

I have a tariff here filed by the Houston Belt & Terminal Co. covering their charges on intrastate and interstate traffic which is filed with the Interstate Commerce Commission.

Geo. M. Crittenden, called as a witness by Complainants, testified as follows:

I live here in Houston, and am Auditor for the Port Terminal Railroad Association. The Port Terminal Railroad Association is an association of all the trunk lines entering Houston, and it is the lessee of the Municipal Belt Railroad. The charges and the revenues are pro rated to the member lines on the basis of cars handled, relative number of cars handled during the month.

The proceeds are turned over to the various roads in proportion to the number of cars handled by the roads; however, the expenses exceed the revenues. The Port Terminal Co. does not make any report to the Interstate Commerce Commission. The railroad companies take their proportional part of the earnings into their earnings as a part of the main earnings. I mean, we handle—this expense is pro rated to the member lines and we make a bill against [fol. 45] them and I presume they take it into their operating expenses. I do not file any tariffs with either the Interstate or the State Commission, not in that name of the Port Terminal Railroad Association. It has no published tariffs anywhere. I don't know just what our legal status is. We are an association. We own one car. We lease our power. We are leasing at present four locomotives and we handle the cars of the member lines to their destination. We operate it as though all the member lines owned this little piece of road. I think we do not treat it as an independent piece of road at all, but merely as a part of all of the roads connected with it; we merely act as their agent in delivering the freight. So far we have no accounts filed anywhere, no reports filed with any Commission, no reports made to any Commission. Our associahtion is the only association or company that operates this Municipal Belt Railroad. I couldn't state whether the Interstate Commerce Comimssion undertakes to regulate our charges that I spoke about.

The expenses of the operation are pooled. They are borne by the Rialroad Companies who are members of this pool. The Interstate Commerce Commission has not so far attempted any kind of regulation with respect to those charges or those expenses. We are keeping them in accordance with the Interstate Commerce Commission's classification of accounts. We collect revenue on shipments moving within the Terminal or on intra-terminal business. But on interstate bsuiness we do not collect anything, the railroad agents collect that. All the relation we have with the shippers is on local inter-city hauls. The contract does not provide for a flat rate for switching, so much per car. We pool the expenses and bill it out on the number of cars handled for each line.

There's a tariff gotten out by all the railroads of Houston. It is not in the name of our association. These tariffs [fol. 46] that are gotten out contain in them the rates, the schedules for the charges made on the Municipal Belt Line. I have one of those tariffs with me. The entire terminals of the Port Terminal Railroad are operated by the various roads under this association, in its name. And then connecting with the Port Terminal, and we are connected with the main lines of this association. We are not chartered. We are operating under a contract. It is just a name, we are not a company.

The Tariff was thereupon introduced and is attached hereto, marked Exhibit No. 7.

The map tendered by Mr. Garrison was marked Exhibit No. 8, and is also attached hereto.

E. A. O'Donnell, recalled as a witness for Complainants, testified as follows:

The expense of the Port Terminal Railroad Association is divided on a per car basis between the Southern Pacific Lines, the M. K.-T. the I.-G. N., and the Houston Belt & Terminal representing its tenant lines,—the Santa Fe, the T. B. V., and the Gulf Coast Lines. The Houston Belt represents those lines.

Exhibit No. 1 in Evidence

State of Texas,
County of Harris:

Know all men by these presents:

That we, the subscribers, all citizens of Harris County, Texas, under the provisions of the Revised Statutes of the State of Texas, do hereby form and incorporate ourselves into a voluntary association, for the purpose of construct-[fol. 47] ing, owning, maintaining and operating a terminal railway in accordance with the provisions of Subdivision 53, of Article 1121, Vernon's Texas Civil Statutes, 1918 Supplement, and to that end we hereby adopt and subscribe the following Charter:

Article 1. This corporation shall be known as the Northside Belt Railway Company, and by which name it shall contract and be contracted with, sue and be sued, and transact all of its business.

Article 2. This Corporation is formed for the purpose of constructing, owning, maintaining, and operating a terminal railway; and this corporation, in addition to the rights conferred by law upon corporations generally, shall have and exercise all of the rights, powers, and privileges conferred by subdivision 53, Article 1121, Vernon's Texas Civil Statutes, 1918 Supplement, including the rights, power, and privileges conferred upon railroad companies by Chapters 8 and 9 of Title 94, of the Revised Statutes of the State of Texas relating to Railroads. The main line of railway of this Corporation shall be construed, commencing at the Northwest corner of the American Petroleum Company's Terminal property, thence to extend in a westerly direction to intersect with the main line of the Houston Municipal & Harbor Belt Railroad in the Northeastern part of the City of Houston, a distance of approximately five (5) miles, and located wholly within Harris County, Texas.

Article 3. The place of business of the Corporation shall be the City of Houston, Harris County, Texas, which shall be its principal office.

Article 4. Said Corporation shall exist for a term of fifty (50) years, and at the end of said term this Charter may be continued in the manner provided by law.

[fol. 48] Article 5. The business of the Corporation shall be transacted by seven directors, who shall be elected by the stockholders annually. The following named stockholders are declared to be directors for the first year, and in them shall be vested the government of the corporation, and the management of its affairs.

Name	Residence
A. M. Johnson	Houston, Texas.
J. Y. Powell	Houston, Texas.
T. J. Arnold	Houston, Texas.
H. J. Cullinan	Houston, Texas.
G. R. Morgan	Houston, Texas.
W. T. Sinclair	Houston, Texas.
Beeman Strong	Houston, Texas.

Article 6. The amount of the capital stock of the corporation shall be Ten Thousand Dollars ($10,000.00) divided into One Hundred (100) shares of One Hundred ($100.00) Dollars each, all of which capital stock has been subscribed and all of which has been paid in, as per affidavit hereto attached.

In testimony whereof, we hereunto sign our names this the 19th day of March, A. D. 1925.

A. M. Johnson, J. Y. Powell, T. J. Arnold, W. W. Moore, Jr., G. R. Morgan, W. T. Sinclair, T. J. Mullin, H. J. Cullinan, G. S. Harrington, Beeman Strong.

[fol. 49] STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared A. M. Johnson, J. Y. Powell, T. J. Arnold, W. W. Moore, Jr., G. R. Morgan, W. T. Sinclair, T. J. Mullin, H. J. Cullinan, C. S. Harrington and Beeman Strong, known to me to be the persons whose names are subscribed to the foregoing instrument, and severally acknowledged to me that he executed the same for the purposes and consideration therein expressed.

In testimony whereof, I hereunto subscribe my name and affix the seal of my office, this the 19th day of March, A. D. 1925.

J. L. Rundell, Notary Public in and for Harris County, Texas. (Seal.)

STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared A. M. Johnson, J. Y. Powell, T. J. Arnold, W. W. Moore, Jr., G. R. Morgan, W. T. Sinclair, T. J. Mullin, H. J. Cullinan, C. S. Harrington and Beeman Strong, known to me, who having been by me first duly sworn, on oath say each for himself:

That they are the identical parties who executed the Charter of the Northside Belt Railway Company, as incorporators; that the full amount of the capital stock of

said Corporation has been in good faith subscribed and fully paid in; that the following are the names and post office addresses of the parties subscribing to the capital stock:

Name	P. O. Address
[fol. 50] A. M. Johnson	Houston, Texas.
J. Y. Powell	Houston, Texas.
T. J. Arnold	Houston, Texas.
W. W. Moore, Jr	Houston, Texas.
G. R. Morgan	Houston, Texas.
W. T. Sinclair	Houston, Texas.
T. J. Mullin	Houston, Texas.
H. J. Cullinan	Houston, Texas.
C. S. Harrington	Houston, Texas.
Beeman Strong	Houston, Texas.

That the amount subscribed by each and the amount paid in by each, is as follows:

Name	Amount Subscribed	Amount Paid In
A. M. Johnson	$9,100.00	$9,100.00
J. Y. Powell	100.00	100.00
T. J. Arnold	100.00	100.00
W. W. Moore, Jr	100.00	100.00
G. R. Morgan	100.00	100.00
W. T. Sinclair	100.00	100.00
T. J. Mullin	100.00	100.00
H. J. Cullinan	100.00	100.00
C. S. Harrington	100.00	100.00
Beeman Strong	100.00	100.00

That the above subscriptions were paid in cash.

A. M. Johnson, J. Y. Powell, T. J. Arnold, W. W. Moore, Jr., G. L. Morgan, W. T. Sinclair, T. J. Mullin, H. J. Cullinan, C. S. Harrington, Beeman Strong.

[fol. 51] Sworn to and subscribed before me on this the 19th day of March, A. D. 1925. J. L. Rundell, Notary Public in & for Harris Co., Texas. (Seal.)

Certificate

I hereby certify that the attached original articles of Incorporation of Northside Belt Railway Company were submitted to me on the 23rd day of March, 1925, and that having carefully examined the same I find them in accordance with the provisions of Chapter 1, Title 115, of the Revised Statutes of Texas, and not in conflict with the laws of the United States or of the State of Texas.

Wright Morrow, Acting Attorney General. (Seal.)

Indorsed: Filed in the office of the Secretary of State this 23 day of March, 1925. D. A. Gregg, Chief Clerk & Acting Secretary of State.

The State of Texas, Department of State

I, Emma Grigsby Meharg, Secretary of State of the State of Texas, do hereby certify that the foregoing is a true and correct copy of Charter of Northside Railway Company, as filed in this office March 23, 1925, with the indorsement thereon, as now appears of record in this Department.

[fol. 52] In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the seal of State at my office in the city of Austin, this 9 day of June, A. D. 1925.

Emma Grigsby Meharg, Secretary of State. (Seal.)

Exhibit No. 2 in Evidence

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of letter dated Washington, June 19, 1925, addressed to Mr. Charles H. Bates, Attorney at Law, Suite 224 Mills Bldg., 17th St. & Pennsylvania Ave. N. W., Washington, D. C., signed G. B. McGinty, Secretary

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 20th day of June, A. D. 1925.

George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 53] Interstate Commerce Commission, Washington

June 19, 1925.

Mr. Charles H. Bates, Attorney at Law, Suite 224 Mills Bldg., 17th St. & Pennsylvania Ave. N. W., Washington, D. C.

Dear Sir: Replying to your letter of the 17th instant, I would advise that we have no record of an application having been filed by the Northside Belt Railway Company asking for a certificate of public convenience and necessity for construction of a terminal railroad in Harris County, Texas. It follows therefore that no certificate has been issued to this carrier for authority to construct such a terminal railroad.

Yours very truly, G. B. McGinty, Secretary.

Exhibit No. 3 in Evidence

Port Terminal Railroad Association

Agreement covering the maintenance and operation of the Port Terminal Railroad Association, Effective July 1st, 1924

The State of Texas,
County of Harris:

This agreement witnesseth the following contract this day entered into by and between the parties hereto, to-wit:

[fol. 54] (1) Navigation and Canal Commissioners of Harris County Houston Ship Channel Navigation District, acting for said District and hereinafter referred to as Navigation and Canal Commissioners;

(2) Southern Pacific Lines, a railroad system consisting of: Texas and New Orleans Railroad Company, The Houston, East & West Texas Railway Company, The Galveston, Harrisburg and San Antonio Railway Company, Houston & Texas Central Railroad Company;

(3) International-Great Northern Railroad Company;

(4) Gulf Coast Lines, a railroad system consisting of:

The St. Louis, Brownsville and Mexico Railway Company,
The Beaumont, Sour Lake & Western Railway Company;
(5) Gulf, Colorado and Santa Fe Railway Company;
(6) Trinity & Brazos Valley Railway Company;
(7) The San Antonio & Arkansas Pass Railway Company;
(8) Missouri-Kansas-Texas Railroad Company of Texas;
(9) Sugar Land Railway Company.

I

Name

The name under which the parties hereto shall conduct and carry on the business for which this contract and agreement is made and entered into shall be:

[fol. 55] "Port Terminal Railroad Association," hereinafter referred to as the Association.

II

Purpose

(a) The purpose of this Association is, on equal terms and conditions, to provide impartial, efficient, unified and economical switching service, by an independent and neutral organization, separate and distinct from the organization of, but for the benefit of all the parties hereto, to serve publicly owned wharves, docks, elevators or other water terminal facilities, and publicly owned railroad facilities, now existing or hereafter constructed on or immediately adjacent to either side of the Houston Ship Channel between the Turning Basin and Lynchburg so as to thereby afford every railroad entering the City of Houston access thereto without discrimination, so far as may be.

(b) To provide the same character of switching service for all privately owned wharves, docks, elevators or other privately owned water terminals, and for all privately owned industries now or hereafter constructed on or immediately adjacent to either side of the Houston Ship Channel, as aforesaid.

(c) The Association shall not undertake to serve any water front now owned by any railroad a party hereto or

any privately owned wharf, dock or industry now served exclusively by any railroad a party hereto, with the exception of the Manchester and Galena industries; but this shall not be construed to mean that the Association shall not hereafter serve privately owned wharves or industries so [fol. 56] located should the owner or owners thereof at his or its cost construct a spur track from such property to the tracks of the Navigation District included in this operation, in which event the Association shall perform such switching service.

III

Management

The control and management of the affairs of the Association shall be vested in a Board of Control consisting of one representative of each of the railroads or railroad systems and one representative of the Navigation and Canal Commissioners parties hereto, each of whom shall have one vote. The Southern Pacific Lines, consisting of the following railroad corporations, viz.—Texas and New Orleans Railroad Company; The Houston, East and West Texas Railway Company; The Galveston, Harrisburg and San Antonio Railway Company; and Houston & Texas Central Railroad Company; shall jointly have one vote only; and the Gulf Coast Lines, consisting of the following railroad corporations, viz.—The St. Louis, Brownsville and Mexico Railway Company and The Beaumont, Sour Lake & Western Railway Company, shall jointly have one vote only.

All other railroad or railway companies, parties hereto, shall each be entitled to one vote.

Any railroad entering the City of Houston, which may hereafter desire to become a party hereto, may do so on the same terms and conditions.

Any other railroad or railroad system that may hereafter join the Association shall be entitled to one vote and if any railroad or railroad system withdraws from the Association as provided in Article XIV hereof, the total number of votes shall be correspondingly reduced.

[fol. 57] In the event that through stock ownership, lease, consolidation or otherwise, any railroad company or system, a party hereto, shall be acquired, controlled or operated,

directly or indirectly, by any other railroad company or system, party hereto, or by any other railroad company or system owning or controlling in any way other railroad company or system, a party hereto, the separate vote and representation of the railroad company or system so acquired, controlled or operated shall forthwith terminate.

The Board of Control shall exercise complete authority and supervision over all operating affairs of the Association, in accordance with the terms of this contract, and may provide whatever supervisory officers the Board may consider necessary for the proper conduct of the affairs of the Association.

The officers and employees employed by the Board of Control shall be well versed in the railway operation. The compensation paid shall be commensurate with the duties performed and comparable with the remuneration allowed by railroads generally in Texas.

The representative of the Navigation and Canal Commissioners shall be chairman of the Board of Control and preside at all meetings thereof.

Meetings of the Board of Control shall be held monthly, and members thereof may be present in person or by proxy, and meetings may be called at any time by the Chairman and shall be called by him whenever requested in writing so to do by one or more members.

A majority of the members thereof shall constitute a quorum for the transaction of business at all meetings, and an accurate written record shall be kept of all proceedings thereof by a Secretary appointed by the Board.

The minutes of each meeting shall be read at the next meeting and approved in the usual manner.

[fol. 58]

IV

Neutral Management

(a) Such rules and regulations shall, from time to time be adopted and promulgated by a majority vote of the Board of Control as it shall deem appropriate and necessary to *efficit* and economically perform the switching service herein contemplated and to properly facilitate the conduct of its affairs.

(b) All rules, regulations and orders issued by the Association shall be reasonable, just and fair to all railroads, parties hereto; and the management and conduct of the operation shall be at all times without discrimination or preference, and the Board of Control shall at the written request of any one of the parties hereto, remove from its service any officer or employee who is shown to have failed or refused to observe this requirement.

V

Railroad Facilities to be Included

(a) All railroad tracks and facilities now or hereafter owned, leased or constructed by the Harris County Ship Channel Navigation District, hereinafter referred to as the Navigation District, substantially as indicated by the blue print drawing D-2-40, hereto attached and made a part hereof, marked "Exhibit A," so colored as to show the tracks now owned and proposed to be constructed by the Navigation District and those leased from other railroads.

(b) The Navigation and Canal Commissioners shall proceed diligently with its present construction program, as [fol. 59] outlined on the accompanying blueprint, including a suitable roundhouse and other necessary fixed equipment.

(c) All tracks now owned or leased by the Navigation District to be ballasted and in good condition when turned over to the Association for operation, and all tracks constructed or leased in the future must be likewise ballasted and in good condition before turning same over to the Association for operation; and at the termination of this contract, such tracks will be returned by the Association to the Navigation and Canal Commissioners in like condition, less ordinary wear and tear.

(d) The Navigation and Canal Commissioners shall furnish the initial supply of tools and movable equipment necessary for the proper and efficient maintenance and operation of the facilities covered by this agreement.

VI

Compensation

(a) The Association shall pay the Navigation District Sixty-seven and one-half (67½) cents for each and every loaded car passing in either direction over the Navigation District's tracks and also between any two points on the Navigation District's tracks, except that for cars in intra-city switch business the charge shall be Thirty-three and three quarters (33¾) cents per loaded car moving over the tracks of the Navigation District in either direction, further, that nothing shall be paid for locomotives, empties or for cars loaded with material for maintenance of the tracks included herein.

[fol. 60] (b) The Association shall, at its cost and expense, maintain the tracks and other property turned over to it by the Navigation District in a safe and efficient operating condition; and at the termination of this contract, the Association obligates itself to return them to the Navigation District in the same condition. This, however, shall not include the maintenance of sub-structures under tracks on wharves or warehouses, wharf approaches or covering of wharves.

(c) The Navigation and Canal Commissioners reserve the right to inspect the facilities at any and all times, advising the Association in writing if, in the judgment of the Nav-gaton and Canal Commissioners, the facilities are not being maintained in a safe and efficient operating condition.

If dispute should rise between the Navigation and Canal Commissioners and the Association as to proper maintenance of the facilities, three competent arbitrators shall be appointed to settle the controversy; one arbitrator each to be selected by the Association and the Navigation and Canal Commissioners, and the two arbitrators so appointed shall choose the third, and the decision of a majority thereof shall be binding on all parties thereto.

(d) The Association shall, at its own expense, pay its proper proportion of the maintenance cost of the tracks leased by the Navigation District, as covered by contracts with railroads, parties hereto.

VII

Use of Facilities

(a) Use of tracks of the railroads parties hereto and leased for the purpose hereof shall be for the passage of [fol. 61] trains and engines of the Association only and not for any railroad other than the owner thereof, nor shall said tracks be used for the purpose of springing any other tracks therefrom except with the consent of the owner thereof.

(b) Use of all tracks shall be confined to cars and engines of the Association except any member railroad may use the tracks owned by the Navigation District or tracks leased by it from the City of Houston, upon reasonable rules and terms prescribed by the Navigation and Canal Commissioners for the performance only of interchange between such railroad party hereto and the Association.

VIII

Per Diem and Demurrage

(a) Cars in line-haul service or cars in intra-city switch service while on the tracks operated by the Association shall remain in the per diem accounts of the respective interested railways who shall make all per diem settlements for such cars. Demurrage shall be assessed and collected by each interested railway covering its own business. The switching revenue for the service covered in this paragraph shall accrue to the interested carrier.

(b) On cars in intra-plant or inter-plant business or exclusive Association business, rental at the current per diem rate shall be paid by the Association to the Railway in whose account the cars stand. Bills for such per diem shall be rendered by the interested carriers, paid by the Association [fol. 62] and charged to operating expenses. Demurrage accruing on cars in such service will be collected by the Association and treated as revenue. The switching revenue for the service covered by this paragraph shall accrue to the Association.

(c) By the term "intra-plant" is meant the movement of a car from one location to another location on the same track at an industry or the movement from a location on one track to a location on another track at the same industry.

By the term "intra-plant" is meant cars moving between plants located on the ship channel on Navigation District tracks. By the term "intra-city" is meant cars moving between points on the Navigation District tracks and points on the tracks of member lines on the ship channel and between points on the Navigation District tracks and points on the tracks of member lines within the switching limits of Houston.

IX

Taxes, Public Assessment, etc.

(a) The Association shall not be required to pay any taxes of any kind or character on tracks or facilities owned by the City of Houston, the Navigation District, or tracks leased from Railroads, parties hereto. Public assessments for paving, sewer, etc., and levies of every character, additions and betterments to tracks and facilities of Navigation District and City of Houston to be paid for by the Navigation District, provided no additions and betterments shall be made without first securing permission in writing of the Navigation and Canal Commissioners.

[fol. 63] (b) Additions and betterments to tracks owned by any railroad party hereto and leased to the Navigation District, to be made by owning line and added to valuation. In any renewal of structure such as drawbridges, or other steel bridges or piers made during the term of this agreement, only such proportion of the operation expenses in connection with such renewal shall be charged to the Association as the length of time such structure has been used by the Association bears to the total life of such structure since its last complete renewal.

(c) It is understood and agreed that the Navigation District will assume any pay the rental charges on tracks leased from the Railroads parties hereto.

X

Division of Revenue and Expenses

All revenue of association and all expenses incurred in maintenance and operation thereof, including personal injuries, loss and damage and all other casualty expenses properly chargeable to the Association, to be divided between railroads parties hereto (Navigation District not included) on basis that number of loaded and empty cars handled for all member railroads, except that only 50% of the loaded and empty cars handled in intra-city switch service shall be counted. Loaded and empty cars shall be counted once when entering upon the Navigation District's tracks and once when leaving them, intermediate moves not to be counted. Cars in work service and cars in intra-plant or inter-plant service or exclusive Association business shall not be counted.

[fol. 64] Records of parties hereto, insofar as they pertain to joint operation and records of Association, to be open to inspection by any and all parties hereto, and the parties hereto will, from time to time, appoint committee to audit books of the Association and make report to all parties to this agreement.

XI

Switch Engines, Equipment, etc.

Railroads, parties hereto, shall furnish necessary switch engines, caboose and work equipment required by the Association to efficiently operate the unified switching arrangement, each railroad or railroad system party to the agreement, to provide its pro rata of such switch engines, caboose and work equipment in rotating periods on basis of division of operating expenses. Rental of locomotives to be on basis of A. R. A., or usual rental charges; rental of caboose and work equipment to be on basis of current rates in use on railroads, parties hereto. Heavy and general repairs to be made and paid by the Association. Repairs to cars to be made and paid for by the Association, in accordance with current A. R. A. rules. In case of any repairs made necessary by accident or carlessness of As-

sociation employees, the Association shall pay the cost of such repairs. If such accident shall result in substantial destruction of any locomotive or car, the Board of Control shall determine whether same shall be repaired by the Association or whether the Association shall pay the owning road the amount of such damage.

Railroads, parties hereto, to furnish necessary cars for revenue loading over their lines, all such cars to be returned to delivering line. The Association will be responsible for the violation of car service rules or misuse of cars in its possession.

[fol. 65]

XII

Unforseen Destruction of Physical Property

Partial or whole destruction of jointly used physical property by wars, floods, acts of God or any other action beyond the foresight or control of the Association, to be reconstructed or restored by Navigation District or owning line or lines, at its or their expense, as their respective interests may appear.

XIII

Working Capital

Railroads or railroad systems, parties hereto, will each advance the Association as working capital, the sum of $5,000.00. After the Association has been in operation sufficient length of time to determine proportion of operating expenses chargeable to each railroad or railroad system, working capital will be applied to payment of operating expenses until it is exhausted and thereafter the Association will draw on each railroad or railroad system, party hereto, on first and fifteenth of each month for its proportion of operating expenses, such amounts, including errors and discrepancies in bills to be adjusted monthly, to the actual proportions due from each such road.

Each member railroad or railroad system guarantees payment of drafts on its line of the Association as they are drawn.

XIV

Term of Contract

This agreement shall become operative on July 1, 1924, and remain in effect for one year and thereafter, unless [fol. 66] or until any railroad or railroad system, party hereto, should desire to withdraw from the Association. In the event any railroad or railroad system should desire to do so, it may at any time after July 1, 1925, give notice in writing to all parties hereto of such intention; and such withdrawal shall be permitted and become effective at the end of a period of one (1) year from the date of such written notice.

Upon the receipt of such written notice of withdrawal, any railroad or railroad system not desiring to withdraw from the Association, shall, within sixty (60) days from the receipt of such notice of purpose to withdraw by a member of the Association, give notice in writing to the other parties hereto of their desire to carry on and continue the business of the Association; and should they do so, this contract and agreement shall remain in full force and effect, subject to the right of any railroad or railroad system so remaining to give notice in writing of its or their desire to withdraw from the Association, by giving the written notice herein provided for, effective at expiration of one (1) year from the date of such notice.

The Navigation and Canal Commissioners shall have the right to terminate this contract, should it desire to do so, by giving written notice at any time after July 1, 1925; and should such notice be given, this contract shall cease and be determined twelve (12) months from the date of such written notice.

In the event that any of the provisions of this agreement shall be found, in practice, to operate unjustly with respect to or to be unduly burdensome upon any party or parties hereto, it is agreed that the party or parties so aggrieved may demand a modification of this agreement so that such injustice shall be remedied and all parties hereto agree to [fol. 67] meet such demand in a spirit of fairness and justice and to modify this agreement accordingly.

Witness our hands this 30th day of June, 1924.

Navigation and Canal Commissioners of Harris County Houston Ship Channel Navigation District, by (Signed) E. A. Peden, Chairman. Texas and New Orleans Railroad Company, by (Signed) W. R. Scott, President. The Houston, East & West Texas Railway Company, by (Signed) W. R. Scott, President. The Galveston, Harrisburg & San Antonio Railway Company, by (Signed) W. R. Scott, President. Houston & Texas Central Railroad Company, by (Signed) W. R. Scott, President. International-Great Northern Railroad Company, by (Signed) T. A. Hamilton, President. The Saint Louis, Brownsville & Mexico Railway Company, The Beaumont, Sour Lake & Western Railway Company, Gulf Colorado and Santa Fe Railway Company, by (Signed) F. J. Pettibone, Vice-President & Gen. Manager. Missouri-Kansas-Texas Railroad Company of Texas, by (Signed) C. A. Whitehead, Executive Vice-President. Trin-
[fol. 68] ity & Brazos Valley Railway Company, by (Signed) John A. Hulen, Receiver. The San Antonio & Arkansas Pass Railway Company, Sugar Land Railway Company, by (Signed) W. T. Eldridge, President.

Approved as to Form: (Signed) Thos. H. Ball, Counsel.

Approved as to Terms and Conditions: (Signed) W. B. Drake, Superintendent Public Belt Railroad.

Approved: (Signed) —— Farrar, Chairman Railroad Committee.

Approved as to Form: Baker, Botts, Parker & Garwood, General Attorneys, Southern Pacific Lines. Andrews, Streetman, Logue & Mobley.

[fol. 69] We, the respective attorneys for the parties of record do hereby agree that the above 31 pages of typewritten matter with certain exhibits not attached hereto, constitute a full, true and correct statement of facts in this cause.

Garrison & Watson, Attorneys for T. & N. O. R. R. Co. Nelson Phillips, W. W. Moore & J. Y. Powell, Attorneys for Northside Belt Railway Co.

Statement of facts. Filed 10 day of Nov. 1925.

[fol. 70] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 71] Minute entry of argument and submission, Jan. 3, 1927, omitted in printing.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 4718

TEXAS & NEW ORLEANS RAILROAD COMPANY, Appellant,

VERSUS

NORTH SIDE BELT RAILWAY COMPANY, Appellee

Appeal from the District Court of the United States for the Southern District of Texas

Jno. T. Garrison (H. M. Garwood and Jno. T. Garrison on the brief), for Appellant.

Nelson Phillips (W. W. Moore, J. Y. Powell and Nelson Phillips on the brief), for Appellee.

OPINION FILED—January 8, 1927

Before Walker, Bryan, and Foster, Circuit Judges

WALKER, Circuit Judge:

This was a suit by the appellant which sought only a temporary restraining order and an injunction restraining the appellee from prosecuting a suit instituted by it for the condemnation of described land of the appellant and from constructing, maintaining or operating a described railroad upon or across that land. The appeal is from a decree dismissing the bill without prejudice to the right of the appellant to apply in the future for an injunction against the appellee "if its activities in the future shall [fol. 73] bring it properly within the purview of the Act of Congress known as the Transportation Act of 1920." It is

disclosed by the record that no restraining order or interlocutory injunction was issued, and that, before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same. As the only relief prayed for was action by the court restraining the doing of things which have been done since the suit was brought, the suit has become a moot one, it being altogether futile to forbid the doing of things which already have been done. In the situation disclosed the dismissal of the bill without prejudice was proper. Smyth v. Asphalt Belt Ry. Co., 12 Fed. (2d), 14. The decree is

Affirmed.

[fol. 74] In United States Circuit Court of Appeals

[Title omitted]

Decree—January 8, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Texas & New Orleans Railroad Company, and the surety on the appeal bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 75-80] Petition for rehearing covering 5 pages, filed January 28, 1927, omitted from this print. It was denied and nothing more by order February 10, 1927.

[fol. 81] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—February 10, 1927

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] Supreme Court of the United States

Order Allowing Certiorari—Filed June 6, 1927.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 6, 1927.